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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

COAL EXPORTERS ASS'N OF THE UNITED STATES, NATIONAL COAL ASS'N, and EASTERN COAL TRANSPORTATION CONFERENCE, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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Petitioner Interstate Commerce Commission submits this reply to the briefs in opposition filed by respondents Coal Exporters Association of the United States and National Coal Association (CEA) and by Eastern Coal Transportation Conference and Coastal States Energy Co. (ECTC).

1. It is agreed that, in deciding whether to exempt export coal rail traffic under 49 U.S.C. 10505 from regulation, the Commission was required to determine whether continued regulation is needed to protect shippers from the abuse of market power. The disputed question is whether, in making that determination, the

Commission must employ the methodology prescribed by statute for rate reasonableness adjudications, or whether it was sufficient for the Commission to conclude, on the basis of general market structure and the recent history of export coal rates, that bargaining power between export coal shippers and carriers was "relatively equal" (Pet. App. 74a) and thus that rates would be expected to remain "reasonable" even in the absence of regulation (*id.* at 75a).

As respondents' briefs attest, the choice between these two alternative readings of the Staggers Act is of great importance—in respondent ECTC's words (ECTC Br. 16), "doubly important." The interpretation adopted by the court of appeals and supported by respondents would necessitate specific individual predictive judgments about actual future rates. Respondent ECTC helpfully summarizes elements of the "rate reasonableness" methodology that would be required under their (and the court of appeals') interpretation, but not under the Commission's approach (ECTC Br. 15-16): the Commission would have to determine whether the actual rates that would result from deregulation would comport with the "ban on 'excessive profits' (Section 10707a(e)(1)), the prohibition against inequitable and inefficient distribution of a carrier's revenue burden (Section 10707a(e)(2)(C)(iii)), [and] the minimization of non-compensatory and marginal traffic (Section 10707a(e)(2)(C)(i) and (ii)." Respondent's summary is essentially the same as the court of appeals' interpretation of the methodology the Commission must employ if it is to grant an exemption from maximum rate regulation (Pet. App. 45a).[1]

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[1] Respondents' protestations elsewhere in their briefs (ECTC Br. 17-20; CEA Br. 15) that the court of appeals did not require individuated predictive judgments about future rates are rather hollow. The court itself explained that the Commission erred in granting an exemption without examining "the actual revenue needs of the carriers involved," "the size of the revenue gains they would likely receive from the exemption," and "the degree to which needed

The practical difficulty of applying this rate reasonableness methodology in the context of an industry-wide exemption is explained in our petition (at 18-22) and in the Solicitor General's brief (at 23-25).

The alternative reading of the Staggers Act exemption provision, employed by the Commission in this and every other exemption decision, would permit deregulation to proceed expeditiously, without complex and cumbrous proceedings; any abuses of market power that might occur are to be corrected after the fact, as Congress intended. See H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980). As illustrated in this proceeding, the Commission's approach is to examine the general structure of the market to determine whether there is an imbalance in the bargaining power between shippers and carriers, and to analyze the recent structure of rates to determine whether, in fact, regulation has been needed to maintain reasonable rates.

Here, as explained more fully in our petition (at 5-8) and in the Solicitor General's brief (at 5-9), the Commission found that "coal exporters are an extremely concentrated industry with sufficient bargaining leverage to prevent unreasonable pricing by railroads" (Pet. App. 84a); indeed, rail carriers and export coal shippers have "relatively equal bargaining power" (*id.* at 74a). The Commission also found that—in sharp contrast to domestic coal rates—export coal rail rates had in recent years lagged behind both freight rates in general and coal prices in specific, without the need for any rate complaints by shippers to the Commission.[2] Since the court

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revenue gains would be disproportionately subsidized by one group" (Pet. 45a). Respondents offer no suggestion as to how such findings could be made on other than an individuated, predictive basis.

[2] Respondent CEA asserts that the Commission's finding that there were no export coal complaints prior to 1980 is "plainly wrong" (CEA Br. 21), citing three protests filed in the late 1970s (see *id.* at 5 n.13). However, each of these protests was to a *general* increase, applicable to all freight rates; the protests plainly do not

of appeals did not disturb these factual findings—but merely found them of little relevance under its reading of the law—the question is squarely presented; which of the two alternative methodologies, the Commission's or the court's, is faithful to the terms and purposes of the Act?

The importance of this question is illustrated by respondent ECTC's speculation (ECTC Br. 19-20) about proceedings on remand. Is it true that the Commission need do no more than "establish standards" for exemption "compatible" with other portions of the Staggers Act (CEA Br. 15) or "*explain* how it action complies with the statutory framework" (ECTC Br. 19 (emphasis in original))? What further explanations or findings would be needed on remand to support an export coal exemption?

It seems apparent that no degree of analysis of market structure or the recent history of rates will suffice to support an exemption, for the court of appeals has left the Commission's findings on those issues undisturbed and still held the decision unlawful. Mere elaboration of why these findings are pertinent is presumably useless, since the court has already held, as a matter of law, that a different mode of analysis is required. It seems likely that, on remand, the only course available to the Commission would be to engage in a proceeding designed to determine what the various rates for export coal would be under deregulation; how the revenue gains to the railroads (if any) would compare to their revenue needs; whether other products or services should bear a greater part of the burden of raising adequate revenue; and whether the elimination of inefficient

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support the contention that export coal shippers were special "captives" of the railroads. Moreover, in none of these instances did the export coal shippers find it necessary to file a *complaint* against the resulting rates. See *Southern Ry. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 453-455, 463-464 (1979) (explaining distinction between protests and complaints).

or marginal operations elsewhere in the rail systems might lessen the need to raise revenue from export coal carriage. Such a proceeding, if feasible at all, would consume a large portion of the Commission's resources well into the future. Under such an interpretation of the statute, the Commission is unable to perform the task of "actively pursuing exemptions" (H.R. Rep. 96-1035, 96th Cong., 2d Sess. 79 (1980)), in an "experimental" and "innovative" manner (H.R. Rep. 94-725, 94th Cong., 1st Sess. 243 (1975)), as Congress intended.

2. Respondents' assertions to the contrary (ECTC Br. 10; CEA Br. 13), the broader implications of the question presented here will affect virtually every exemption case. Under the Commission's approach, a proposed exemption must be evaluated on the basis of the considerations expressly listed by Congress (those in 49 U.S.C. 10101a and 10505); under the court of appeals' approach the Commission must read into the exemption provision the underlying policies of the other statutory provisions implicated by the proposed exemption. This divergence in interpretation of the Act, too, has farreaching practical consequences, as respondents backhandedly acknowledge.[3]

If, as the court of appeals held and respondents agree, the Commission must find that the "underlying logic" (Pet. App. 43a) of each provision of the Interstate Commerce Act would be fully satisfied under deregulation before an exemption may be granted, then deregulation will effectively grind to a halt. The Commission will be unable to grant an exemption except in the trivial instances where the provisions in question have *no* substan-

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[3] Respondents insist (ECTC Br. 15; CEA Br. 17-18) that it would upset the "compromise" struck by the Staggers Act if the Commission were to grant exemptions without considering the policies of the provisions of the Interstate Commerce Act from which an exemption is being sought. We disagree with their conclusion, of course, but agree that this issue of statutory interpretation is fundamental.

tive effect on the market. However, if—as Congress expressly provided—the Commission is to judge the value of continued regulation against the extrinsic standards established by the National Rail Transportation Policy (49 U.S.C. 10101a) and the exemption provision (49 U.S.C. 10505), then there is a genuine possibility that, in Congress' words in the National Rail Transportation Policy, "competition and the demand for services [may] establish reasonable rates for transportation by rail" to "the maximum extent possible" (49 U.S.C. 10101a(1)).

3. Respondents do not seriously contest the importance of these issues. Rather, they direct this Court's attention to the straw man erected by the court of appeals—to the so-called "standard" supposedly employed by the Commission (ECTC Br. 13; CEA Br. 8, 14).[4] By now, it should be apparent that the court of appeals simply misconstrued the Commission's opinion. Despite their attorneys' diligent efforts, both sets of respondents were able to discover only one sentence in the Commission's opinion that purportedly supports the court's reading (Pet. App. 83a, quoted at ECTC Br. 13, CEA Br. 8, 14):

> [T]he issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

To state that an issue "must be analyzed in the context" of another question is, however, a far cry from announc-

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[4] Respondent CEA also criticizes the factual basis for the Commission's decision (CEA Br. 20-21) as "a collection of speculation, unsupported assertions, and anecdotal evidence which were vigorously contested by shippers and in the dissent" (CEA Br. 20). However, as this case comes to the Court, the factual findings of the Commission remain undisturbed (see Pet. App. 27a, 45a). We have defended those findings in the court of appeals, and are prepared to do so again, if necessary, on remand. At this juncture, however, the question is—as the court of appeals noted (*id.* at 27a)—strictly "legal, not * * * factual."

ing a legal "standard." The Commission was simply setting the stage—the "context"—for its discussion of the range of possible divisions of rents. The Commission then went on "[f]irst" to reject the argument of opponents of the exemption that the railroads would appropriate all of the available rents to the point that investment and production would decline (Pet. App. 84a). This is the only portion of the Commission's analysis to which respondents and the court of appeals have referred. Immediately following that discussion, however, is a three-page analysis of the structure of the export coal transportation market, from which the Commission concluded that in fact deregulation will place the parties "on an equal footing" (*id.* at 86a) and that only in the "rare instance" will the railroad exercise substantial bargaining leverage over the export coal shipper (*id.* at 85a).[5]

Respondents simply ignore the second portion of the Commission's analysis. Indeed, quite remarkably, in 48 combined pages of brief in opposition, neither set of respondents quoted, paraphrased, attempted to explain, or even acknowledged the existence of the Commission's central findings of "equal footing," "relatively equal bargaining power," and "sufficient bargaining leverage to prevent unreasonable pricing by the railroads." It is as if the Commission had not written that portion of its opinion.

In this, respondents are simply repeating the analytical errors of the court of appeals, which also failed to quote, explain, or acknowledge these key findings. We would emphasize, however, that this would not in itself raise an issue of sufficient importance to warrant certiorari. It is not that the court misread the Commission's opinion, but that it substituted its own erroneous and highly

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[5] The Commission also referred to its earlier discussion of the recent history of export coal rail rates, noting that this constituted "strong evidence that competition results in reasonable—and frequently reduced—rates" (Pet. App. 85a n.63).

disruptive legal standard, that is the basis for our petition. On that point, respondents have but little to say.

4. One final interesting feature of respondents' briefs is their total failure to consider the positive, efficiency-enhancing aspects of the export coal exemption. The Commission found (and neither the court of appeals nor respondents have disputed) that ending the regulation of this service would result in significant operating efficiencies, chiefly deriving from the increased use of long-term contracting, which is impeded by the present regulatory scheme. See Pet. App. 76a. It is in large part for this reason that the Commission found that the exemption would promote some seven elements of the National Rail Transportation Policy, to the eventual benefit of the export coal industry as well as railroads and the public (*id.* at 75a-78a, 82a). The Commission's predictions on this score "reflect[ed] [its] experience with other exemptions" (*id.* at 77a), including the exemption of "piggyback" traffic, in which similar dire prophecies by shippers proved false and the benefits of increased competition were realized.[6]

It is typical of defenders of economic regulation to portray the question as one of the distribution of fixed levels of revenue, and to disregard the possibility that increased competition might expand the prospects for profitable activity for all the participants in the market. Respondents are no exception. But the Commission's decision to reintroduce competition to the transportation of this significant export product—with the possibility of reregulation if market power is abused—is far more consistent with the congressional judgment that "greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads" (Staggers Rail

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[6] In this connection, it is noteworthy that the export coal exemption has been in effect since September 12, 1983, without any apparent evidence of an abuse of market power. The Commission has stated that, if such abuse were to occur, it stands ready to "revoke our decision here pursuant to 49 U.S.C. 10505(d) and restore regulation" (Pet. App. 87a).

Act of 1980, Pub. L. No. 96-448, § 2(9), 49 U.S.C. 10101a note) and with the experience and judgment of the Commission.

CONCLUSION

For these reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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